1949

Dora Burton v. J. H. McLaughlin : Brief of Respondent

Utah Supreme Court

Merrill C. Faux; Attorney for Respondent;

IN THE SUPREME COURT

OF THE

STATE OF UTAH

- - - - - - - - - - -

DORA BURTON,

Plaintiff and Respondent,

vs.

J. M. McLAUGHLIN, Administrator of the Estate of Patrick Henry McLaughlin, deceased,

Defendant and Appellant.

CASE NO. 7392

- - - - - - - - - - -

BRIEF OF RESPONDENT

- - - - - - - - - - -

Merrill C. Faux

Attorney for Respondent

INDEX TO BRIEF

TEXTS CITED

CASES CITED

IN THE SUPREME COURT

OF THE

STATE OF UTAH

- - - - - - - - - - -

DORA BURTON,)

Plaintiff and)
Respondent,)

vs.) CASE NO. 7392

J. H. McLAUGHLIN,)
Administrator of the)
Estate of Patrick)
Henry McLaughlin,)
deceased,)

Defendant and)
Appellant.)

- - - - - - - - - - -

BRIEF OF RESPONDENT

- - - - - - - - - - -

STATEMENT OF THE FACTS

As appellant has done, respondent, in this brief, shall refer to herself as plaintiff and to the appellant as defendant.

Plaintiff agrees with the general facts as set out by defendant in Brief of Appellant, covering where the plaintiff lived, and that she occupied, with Jesus Nonas, a small house which belonged to Patrick Henry McLaughlin, the father of defendant. As to the facts of prime importance in the determination of the questions in this lawsuit, there is a sharp conflict.

Evidence introduced at the trial of the case shows that during the period of about three years, while plaintiff lived in the little house on Garland Court to the rear of the McLaughlin house, that Patrick Henry McLaughlin was an infirm, ailing, old man finally of about eighty years, who became unable to help himself whatever (R. 110, 113); that he was abandoned by his wife and eight children and in a deed signed a few days before his death was shown to be a

single man (Defendant's Exhibit #1 and R. 66); that none of them appeared to comfort or assist him during the last months of his life, until he was at death's door when he was to be removed to a nursing home where he passed away (R. 128). Then Mrs. Kathryn Simpson, his daughter, a nurse, and her husband came to assist prepare him to be removed. (R.131).

That during all of the period from October 1, 1945 to May 17, 1948, plaintiff rendered valuable assistance to Mr. McLaughlin, at his request (R. 63), and for which he expressed his gratitude (R. 112); that he had not paid her (R. 93, 94) but promised her payment (R. 130); that he didn't have anyone to take care of him and that she had agreed to look after him (R. 63); that he regarded her as the only one that ever looked after him and that he

didn't know what he would do without her (R. 71, 86).

ARGUMENT

POINTS I. AND II.

IN POINTS I. AND II. RELIED UPON BY APPELLANT FOR REVERSAL OF THE RULING OF THE TRIAL COURT, IT IS CONTENDED THAT THE COURT ERRED IN DENYING DEFENDANT'S MOTION FOR A NONSUIT AND IN MAKING ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW, IN THAT:

PLAINTIFF WHOLLY FAILED TO PROVE ANY AGREEMENT BETWEEN PLAINTIFF AND DECEASED;

PLAINTIFF WHOLLY FAILED TO PROVE THAT SHE RENDERED SERVICES TO DECEASED;

PLAINTIFF FAILED TO PROVE THAT SHE EVER DEMANDED PAYMENT FOR SERVICES ALLEGEDLY RENDERED DECEASED DURING HIS LIFETIME;

PLAINTIFF FAILED TO PROVE NONPAYMENT FOR SUCH SERVICES;

PLAINTIFF FAILED TO PROVE THE VALUE OF

SUCH SERVICES.

Considering these points with respect to the first four charges set out above, it is appropriate to first determine what is necessary to prove and establish an agreement that would be binding upon the deceased's estate. If the law requires that it be in writing, then plaintiff must admit the validity of defendant's attack upon the trial court's ruling and of this appeal. Similarly, if great precision and formality in an oral offer and acceptance is required, then plaintiff may have great concern in justifying the judgment rendered in her favor. Neither, however, are required. Contracts may be made by person of humble circumstances, with little education and with no understanding of the fundamentals of the law of contracts and they may be proved wholly by a showing of the acts of the parties, from

which their contract may be inferred.

In support of this, the following general statements are submitted:

> "Contracts are expressed when their terms are stated by the Parties. They are often said to be implied when their terms are not so stated. Contracts implied in fact are inferred from the facts and circumstances of the case, and are not formally or explicitly stated in words. It is often said that the only difference between an express contract and a contract implied in fact is that in the former the parties arrive at their agreement by words, whether oral or written, sealed or unsealed, while in the latter, their agreement is arrived at by a consideration of their acts and conduct, and that in both of these cases, there is, in fact, a contract existing between the parties, the only difference being in the character of evidence necessary to establish it." 12 Am. Jur. 499.

In Volume 1, Williston on contracts Sec. 36, the following is said with respect to an implied contract:

> "An offer need not be stated in words. Any conduct from which a reasonable person in the offeree's position would be justified in inferring a promise in return for a requested act or a requested

> promise by the offeree amounts to an offer. The common illustration of this principle is where performance of work as services is requested. If the request is for performance as a favor, no offer to contract is made, and performance of the work or services will not create a contract; but if the request is made under such circumstances that a reasonable person would infer an intent to pay for them (and this is always a question of fact under all the circumstances of the case) the request amounts to an offer, and a contract is created by the performance of the work."

Thereunder the author cites numerous cases, some very similar to the case now before this court as: Raymond v. Sheldon's Estate 92 Vt. 396, 104 A. 106; In re Porter's Estate 110 Pa. Super. 27, 167 A. 490.

A restatement, particularly with respect to personal services is as follows:

> "The general rule is that where services are rendered by one person for another, which are knowingly and voluntarily accepted, without more, the law presumes that such services were given and received in the expectation of being paid for, and implies a promise to pay their reasonable worth." 58 A. Jur. 514.

This Court has adopted the foregoing rule

in the following definition:

> "An implied contract is one where the mutual intent is manifested by particular acts and attendant circumstances." Gleason v. Salt Lake City, 94 Ut. 1, 74 P. (2nd) 1225.

The two cases cited by Williston, Supra, are quite similar to this Burton case with respect to the facts involved. For example in the case against Sheldon's estate, the claim was based upon an implied contract proved by testimony that the witness had seen plaintiff go to decedent's home frequently; that witness had seen plaintiff buy postal cards and gifts for decedent's children and some little lace and ribbons.

Cases heretofore decided by this court are submitted as being particularly helpful on the point of whether there was a contract: In Mathias v. Tingey, 39 Utah 561, 118 P. 781, the jury found that services of an adult daughter rendered to the mother were

worth a dollar a day and board. In affirming the judgment, this court said: (p. 569 in 39 Utah)

> "When it is manifest that valuable services have been rendered, and there is some substantial evidence from which a contract, either express or implied, may be deduced, then, as a general rule, it is safe to submit the case to the jury, under proper instructions, and permit them to determine whether, from all the facts and circumstances a promise to pay may be implied."

In Shields et ux. v. Ekman 67 Utah 474 at p. 482, 249 Pac. 122, the claimants themselves had been permitted to testify, the objection of the "dead man" statute being waived. Other testimony was also introduced, relative to the services performed by the plaintiffs. This Court affirming a judgment for plaintiff said:

> "One of the executors testified that respondents did render services in caring for the decedents, but he insisted the amount they demanded therefor was excessive. That, however, was a question for the trial court to determine. There was also evidence from

a disinterested witness to the effect that he had heard the decedent, Mr. Hanson, declare on several occasions that if the respondent Mrs. Shields would remain and take care of him that she would be 'well compensated' for her services. The contention, therefore, that the evidence is insufficient to support the Court's finding respecting the rendering of the services is wholly without merit. Such is also the case respecting the value of the services rendered. Counsel, however, insist that in such cases a contract or agreement to pay for the services must be established. As pointed out in Matthias v. Tingey, Supra, such a contract may be implied from all the facts and circumstances as in other cases where a contract or agreement must be proved. The evidence was ample to authorize the district court to imply or infer an agreement to pay for the services rendered by respondents. Nor can the contention prevail that respondents failed to prove the value of the services rendered."

In a third Utah case Patton v. Evans 92 Utah 524, 69 Pac. (2nd) 969, this Court passed upon the quantity of evidence necessary to establish a claim in a case similar to the Burton case and stated that an adult person with earning power who gives up that oppor-

tunity and comes to and lives with and cares for her parent when other children had equal responsibility for such care, need not prove implied promise by parent to pay for such services by overwhelming evidence to establish a claim against mother's estate.

All of the witnesses who testified at the trial of this case, except Kathryn Simpson, daughter of the deceased, and her husband, Theodore R. Simpson, testified of some service performed by plaintiff for decedent.

Mrs. Leland L. Jenkins, a neighbor, testified that in the fall of 1947, while Mr. McLaughlin was sick and was at her house to supper, she asked why he didn't come over to their house more often. He replied that the lady in the little house (Dora Burton) "has been bringing me something to eat".

(R.50,51) That during the last year and a half of Mr. McLaughlin's lifetime, she had seen Dora Burton perform services for him, and that during that time Mr. McLaughlin had been sick (R.49, 50); she saw Dora Burton take trays of food in to him, take kindling into his house, sweep the floors (R.50); go on errands for him (R. 57); that Mr. Mc Laughlin had no one else to care for him (R. 53); that she had seen none of his family giving him any assistance or help and that Dora Burton was the only person she had seen giving help and assistance to Mr. McLaughlin (R. 54).

Benjamin A. Bullough, whose business house was next door west of the McLaughlin house, knew both Dora Burton and Mr. Mc Laughlin; that Dora Burton was well acquainted with Mr. McLaughlin's condition of health (R. 61); that Mr. McLaughlin told Mr. Bullough

that "he didn't have anyone to take care of him and Dora Burton had agreed to look after him" (R. 63); that if Mr. McLaughlin required, when he sold his place to Mr. Bullough, that he would "give her ample time and consideration in finding another place to live" (R. 64).

Hyrum Silver testified that Dora Burton had sent him to the drug store several times to get medicine for Mr. McLaughlin and three times to get whiskey and several times to the grocery store (R. 70); that he had been at the back door of the McLaughlin house and had seen Dora Burton cleaning and doing the dishes and on two or three occasions when Mr. McLaughlin was in bed, he had seen her sitting beside him feeding him (R. 71); that he could not see so well, being pretty near blind, but that he could smell something cooking on the stove (R. 72); that Mr. Mc

Laughlin told him Dora Burton was "sure good to him, and he said he didn't know what he would do without her, about the only one that ever looked after him." (R. 71)

Jesus Nonas, a Mexican, who also lived in the little house belonging to Mr. Mc Laughlin testified that Dora Maria Burton, whom he called "Mary" kept house for him and also cooked, washed clothes and cleaned house for Mr. McLaughlin (R. 80); that he had lived there for three years (R. 81); that McLaughlin's children did not help him and that Dora Burton was the only one who helped him (R. 86); that three or four months before he died (R. 92) McLaughlin told Nonas she had helped him for three years "and had no pay or anything" for her (R. 92).

During the spring of 1948, Mr. Raymond R. Brady, a lawyer of Salt Lake City, prepared a will for Mr. McLaughlin. Before and

after performing that service, Mr. Brady called upon Mr. McLaughlin approximately twenty-five times (R. 104) and each time observed Miss Burton there (R. 109) cooking his food, feeding it to him, washing the dishes, going on errands at his request and on one occasion, Mr. Brady saw him give her his railroad retirement check of fifty dollars, after endorsing it, and asked her to go to the grocery store and get some things in the house to eat (R. 111); that she went to the grocery store and returned with groceries and the balance of the money; that in his presence and in the presence of a Mr. Curtis, she commenced using the groceries to prepare a meal for Mr. McLaughlin (R. 112); that Mr. McLaughlin told her to keep the money to buy other things in days to come and that Mr. McLaughlin said to her "--- you have always taken good care of my money and

and taken good care of me" (R. 112). Mr. Brady said he had seen Dora Burton in the McLaughlin house at morning, noon and night; that she had bathed Mr. McLaughlin; put stockings on his feet, went out and got coal and put it in the fire (R. 113); Mr. Brady said McLaughlin told him, "If it wasn't for Dora Burton I probably wouldn't be here now; she is the only one that stuck with me and the only friend I have in the world." (R. 119) That he said further he would take care of her in his own way and that she would be paid (R. 120); that when he got out of the hospital he would make it right with her (R. 130).

Even the defendant admitted that Dora Burton furnished the hot water when his friend went down to clean up for his father (R. 137) and this friend, Kathleen Ruddy, one of defendant's witnesses, asked Miss Burton to wash the curtains and seemed nettled when she

did not do so, as though it was normally expected that she would do such things (R. 152). She admitted also that on one occasion Mr. McLaughlin asked Dora Burton to get a loaf of bread for him (R. 153).

Plaintiff submits that the foregoing, abundant, positive evidence clearly brings her case within the requirements of the definition of an implied contract; that plaintiff did prove:

An agreement;

That she rendered substantial, varied, personal, valuable services;

That she was promised payment on several occasions which eliminated need for a demand for payment which might normally be expected;

That payment has not been made.

As to the fifth charge, the evidence shows that the services performed by plain-

tiff were those usually performed by domestic servants. What she did for Mr. McLaughlin of a more personal nature domestic service, plaintiff upon her own experience and knowledge set the reasonable rate at 75¢ to $1.00 per hour (R. 125). That this evidence was adequate and that the question may even have been decided upon the common knowledge possessed by the trial judge himself, is demonstrated by the following adjudicated cases:

In an Oregon case, the Court held that the reasonable value of plaintiff's claim may be established by the testimony of the claimant alone, Littlepage v. Security Savings & Trust Company, 3 P. (2nd) 752.

In a Colorado case the Court held that evidence similar to that before this Court in the Burton case, established that $5.00 per day was a reasonable allowance for 179

days during which plaintiff provided practical nursing services to the decedent, In re Murphy's Estate 134 P. (2nd) 179. And with respect to the need of expert testimony as to the value of such services, a California appellate court said:

> "There was also ample evidence by other witnesses of the performance of the agreement. The trial judge was convinced by this evidence and it is therefore sufficient on appeal. In matters of continuous domestic service, opinion evidence if given need not be followed if the trier of the facts is convinced that the opinion expressed is not sound. As a rule the facts do not call for the testimony of an expert. If the trier of the facts possesses the common knowledge of the value of such services, their reasonable value may be determined without the aid of opinion testimony." Lundberg v. Katz (Calif.) 11 P. 2nd 917.

Plaintiff contends, however, that if evidence shows damages to be the result of the breach, the mere fact that there is uncertainty as to the amount does not prevent a computation of such an amount by the

finder of the facts. It is stated that:

> "There is a clear distinction between the measure of proof necessary to establish the fact that the plaintiff has suffered some damage and the measure of proof necessary to enable a jury to fix the amount. Formerly, the tendency was to restrict the recovery to such matters as were susceptible of having attached to them an exact pecuniary value, but is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of the damage and not as to its amount, and that where it is certain that damage has resulted, mere uncertainty as to the amount will not preclude the right of recovery." 15 Am. Jur. 414 Sec. 43.

This rule is adopted by this Court in Dee v. San Pedro R. Co., 50 Utah 167 (p. 187), 167 P. 246. In that decision our Court quotes as well from 50 L.R.A. page 40 as follows:

> "The rule that speculative damages cannot be recovered applies where it is uncertain whether damages were sustained at all from the breach or not, and not to such as are merely uncertain in amount."

Further our Court quotes from an Oregon

case:

> "The rule that damages which are uncertain or contingent cannot be recovered does not embrace an uncertainty as to the value of the benefit or gain to be derived from the performance of the contract, but an uncertainty or contingency as to whether such gain or benefit would be derived at all." Blagen v. Thompson 31 P. 647.

Plaintiff's claim filed with defendant, Administrator, set the value of her services in the amount of $1.00 a day for 930 days. Proof is uncontradicted that she rendered some service for a period up to three years and at a time when personal services commanded premium pay. Plaintiff submits, therefore, that the proof compelled a finding that substantial services were rendered and permitted a finding that such services were reasonably worth the amount prayed for.

Plaintiff proved the value of the services rendered.

POINT III.

IN POINT III. THE RULING OF TRIAL JUDGE IS ASSAILED FOR ADMITTING EVIDENCE ALLEGED TO BE CONFIDENTIAL.

The witness who supplied the testimony was Raymond R. Brady. He acted as attorney for the deceased in the preparation of a will which was signed on May 8, 1948 (R.117). He made numerous visits to see Mr. McLaughlin during March, April and May (R. 109). On two of those occasions, Mr. McLaughlin spoke to him regarding Dora Burton, this plaintiff, and what she had done for him. On one occasion, Mr. Bullough, a Mr. Curtis and a notary were present (R.113). On the other, Mrs. Brady, wife of the witness, was present (R. 113). And this visit, when Mrs. Brady was present, was after the will had been signed, was after the relation of attorney and client had terminated and was purely an errand of

mercy rather than a professional visit (R. 114, 115). Furthermore, during the time the conversation was carried on, Mr. McLaughlin did not ask the other persons present to leave the room (R. 115). Defendant points to pages 119-120 of the record for the report of the conversation that allegedly offends the rule prohibiting introduction of confidential communications. Under the circumstances as related above and as contained more fully within pages 113-121 of the record, it seems clear that there was no violation of the rule.

This Court, speaking on that subject in relation to circumstances somewhat similar to those in this case, in the case of Anderson v. Thomas (Utah) 159 P. 2nd 142 at p. 146, said:

> "It is almost uniformly held that this prohibition does not apply where the communication between the attorney and

client takes place in the presence of a third party."

And this authority, we think, answers the argument advanced by defendant under Point III.

WHEREFORE, plaintiff prays that the judgment of the trial court be affirmed; that the appeal be dismissed and that she be allowed to go hence with her costs.

Merrill L. Jarvis

Attorney for Plaintiff and Respondent